INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	5
Argument	8
Conclusion	10

CITATIONS

Cases:	
Bridges v. *Wixon*, decided June 18, 1945	10
Fuller v. *United States*, 110 F. 2d 815, certiorari denied, 311 U. S. 669	10
United States v. *Dawe*, decided April 27, 1945	10
United States v. *Gilliland*, 312 U. S. 86	9
United States v. *Heine*, decided April 27, 1945, certiorari denied June 18, 1945, No. 1331, October Term, 1944	8
United States v. *Meyer*, 140 F. 2d 652	9
Statutes and regulations:	
Section 36 (c) of the Alien Registration Act of June 28, 1940, 54 Stat. 675 (8 U. S. C. 457)	9
Sec. 35 (A) of the Criminal Code, as amended (18 U. S. C. 80)	2
R. S. 4067, as amended by the Act of April 16, 1918, c. 55, 40 Stat. 531 (50 U. S. C. 21)	2, 8
R. S. 4069 (50 U. S. C. 23)	3, 8
Presidential Proclamation 2537, issued January 14, 1942 (3 C. F. R. Cum. Supp., p. 287)	4
Regulations of the Attorney General of February 24, 1942 (7 F. R. 1477, 8455; 28 C. F. R. Cum. Supp. 30.51 ff.)	4, 9

655285—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 136

LUDWIG KOENIGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 124) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 14, 1945 (R. 125). The petition for a writ of certiorari was filed June 18, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a false statement in an application for a certificate of identification by an enemy alien constitutes a violation of Section 35 (A) of the Criminal Code.

2. Whether petitioner's concealment of his status as a probationary member of the Nazi Party in response to a question requiring him to name the organizations of which he had been a member or with which he had been affiliated during the preceding five years, constituted a false statement within the meaning of Section 35 (A).

STATUTES AND REGULATIONS INVOLVED

Section 35 (A) of the Criminal Code, as amended (18 U. S. C. 80), provides in pertinent part as follows:

> * * * whoever shall * * * make or cause to be made any false or fraudulent statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

R. S. 4067, as amended by the Act of April 16, 1918, c. 55, 40 Stat. 531 (50 U. S. C. 21), provides in part as follows:

> Whenever there is a declared war between the United States and any foreign nation or government * * * and the

President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted * * * and to establish any other regulations which are found necessary in the premises and for the public safety.

R. S. 4069 (50 U. S. C. 23) provides:

After any such proclamation has been made, the several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or

> justice; and after a full examination and hearing on such complaint, and sufficient cause appearing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed.

Presidential Proclamation 2537, issued January 14, 1942 (3 C. F. R. Cum. Supp., p. 287), provided in part:

> All alien enemies within the continental United States * * * are hereby required, at such times and places and in such manner as may be fixed by the Attorney General of the United States, to apply for and acquire certificates of identification * * *.

The regulations of the Attorney General issued pursuant to this proclamation on October 19, 1942 (7 F. R. 1477, 8455; 28 C. F. R. Cum. Supp. 30.51 ff.) provide in pertinent part:

> 30.51. * * * persons in the United States * * * required to apply for certificates of identification * * * are as follows:
>
> (a) All aliens who are of the age of 14 years or upward and who are German or Japanese citizens or subjects.
>
> * * * * *

30.56. (n) The following information shall be furnished by each applicant:

* * * * *

(14) The applicant shall list the clubs, organizations, or societies of which he has been a member or officer, or with which he has been affiliated, at any time during the period of 5 years preceding the date of such application either in the United States or abroad. In the event that any such listed membership or affiliation has ceased prior to the date of the application, the applicant shall give the approximate date thereof. If the applicant spent any part of said 5-year period outside the United States, he shall include a statement of his foreign political party or national organization affiliation during such portion of said 5-year period as he spent outside the United States.

* * * * *

30.63. (a) Any alien of enemy nationality herein defined who fails to comply with the regulations in this part or any other regulations governing the conduct of aliens of enemy nationalities, is subject to apprehension, detention, and internment for the duration of the war.

STATEMENT

An indictment in one count was returned against petitioner in the United States District Court for the Eastern District of New York, charging that on February 26, 1942, in violation of Section 35 (A) of the Criminal Code, he made a false

statement of a material fact in a matter within the jurisdiction of the United States Department of Justice in that, in an application for a certificate of identification required of enemy aliens (see *supra,* pp. 2–4), he had stated that he had belonged to no clubs, organizations, or societies other than a credit union during the five-year period preceding the date of the application, whereas in fact he had been a member of and affiliated with the Nazi Party during such period (R. 5–6).

The Government proved that petitioner had made the statement in his application as alleged in the indictment (Gov. Ex. 12, R. 54, 103–106). The evidence supporting the charge that such statement was false, and that petitioner had in fact been a member of or affiliated with the Nazi Party during the five years preceding the application, may be summarized as follows:

The National Socialist German Workers Party, commonly known as the Nazi Party or the N. S. D. A. P., had a branch in the United States under the leadership of Dr. Draeger, a member of the German Consulate in New York (R. 8–17). The party recognized two classes of members—full members who had been in good standing for approximately two years, and "anwaerters," i. e., applicants, or probationary members (R. 9, 34, 98). An applicant for membership signed a form in which he promised unconditional loyalty to the "Fuehrer," agreed to serve the party with all his

strength, and assumed the obligation to pay a fixed initiation fee and monthly dues (Gov. Ex. 1, R. 10, 61, 115). The applicant paid an initiation fee of $1.50, $1.00 for an identification card, $3.00 representing three months' dues in advance, and a propaganda fee, usually of $10 but sometimes of a lesser amount (R. 13–14, 16). Both applicants and full members paid the same dues (R. 10), and the names of both applicants and full members appeared on a list of party members which had been drawn up in the office of the consulate before all other records of party membership "disappeared" in May 1940 (R. 17–18, 24). The names of persons who applied for membership after 1940 were added to that list (R. 20–21, 24–26). Petitioner's name was among the latter group (Gov. Ex. 6; R. 61, 116–117).

In two statements given by petitioner to agents of the Federal Bureau of Investigation, petitioner said that he had applied for membership in the Nazi Party in the latter part of 1940 or the early part of 1941 and had paid a fee of approximately $12.50 (R. 97, 99); that at that time he was told that he would be on probation for two years and thereafter would become a regular member (R. 98); and that he did not pay any further dues because the consulate was closed (R. 97). In his second statement, petitioner said that Vogel, secretary to Draeger, the head of the Nazi Party in the United States (R. 8, 14–15), told him "not

to admit to anyone that I was a member of the NSDAP" (R. 98) and that "Accordingly I did not state I was member of the NSDAP in my 1942 Alien Registration form. I knew that this was wrong" (R. 98).

Prior to petitioner's application for membership in the party, he had been a sympathizer of the German-American Bund (R. 75, 98) and had attended functions of the Nazi Party (R. 76, 100–102). He had obtained forms for application for membership in the party in 1938 but had decided not to use them at that time (R. 99).

Petitioner was convicted (R. 96), and he was sentenced to imprisonment for fifteen months (R. 4, 107–108). On appeal to the Circuit Court of Appeals for the Second Circuit, the conviction was affirmed (R. 125).

ARGUMENT

1. Petitioner's contention that Section 35 (A) of the Criminal Code is not applicable to false statements made in an application for a certificate of identification because Section 4069 of the Revised Statutes, 50 U. S. C. 23 (*supra,* pp. 3–4), confers jurisdiction upon the federal district courts to order the deportation or detention of an alien who violates regulations issued by the President pursuant to R. S. 4067, 50 U. S. C. 21 (Pet. 3, 4–5, 8–9), was correctly answered by the court below in the companion case of *United States* v. *Heine,* decided April 27, 1945, certiorari denied

June 18, 1945, No. 1331, October Term, 1944. As the court there pointed out, neither R. S. 4069 nor Section 30.63 of the Regulations issued by the Attorney General (see *supra*, p. 5), which merely reiterates the provisions of the statute that any alien enemy who violates the regulations shall be subject to detention and internment, makes specific provision for the punishment of false statements by an alien in respect of any matter covered by the regulations issued pursuant to R. S. 4067. Neither does Section 36 (c) of the Alien Registration Act of June 28, 1940, 54 Stat. 675 (8 U. S. C. 457), providing a penalty for false statements in an application for registration under that act, cover false statements in an application for a certificate of identification required of enemy aliens in war time pursuant to the Presidential proclamation issued under the authority of R. S. 4067. Since the application for a certificate of identification was clearly a matter within the jurisdiction of an agency of the United States, and since no other specific statute punishes the making of a false statement in such an application, petitioner was properly charged and punished under Section 35 (A) of the Criminal Code, the general statute covering false statements in any matter within the jurisdiction of any agency of the United States. *United States* v. *Gilliland*, 312 U. S. 86, 95–96; *United States* v. *Meyer*, 140 F. 2d 652, 655 (C. C. A. 2); *Fuller* v. *United States*, 110

F. 2d 815, 817 (C. C. A. 9), certiorari denied, 311 U. S. 669.

2. There is no merit in petitioner's contention (Pet. 3, 5, 10–11) that as an "anwaerter" he was not a member of or affiliated with the Nazi Party and, hence, that the evidence failed to establish a false statement within the purview of Section 35 (A) of the Criminal Code. Petitioner, who paid dues to the Nazi Party and promised allegiance to the fuehrer and party, was, if not actually a member, clearly affiliated with the party in the sense that affiliation was defined by this Court in *Bridges* v. *Wixon,* No. 788, October Term, 1944, decided June 18, 1945; his acts had "that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization * * *." See also *United States* v. *Dawe,* decided April 27, 1945 (C. C. A. 2. In view of petitioner's admission that his failure to reveal his membership in the party was a knowingly wrongful act performed at the suggestion of Vogel, secretary to the head of the party (*supra,* pp. 7–8), the evidence fully supports the conclusion that petitioner was aware that the Government was seeking to be apprised of his affiliation with the party, and that he wilfully concealed such fact.

CONCLUSION

The decision below is correct, and the case presents no conflict of decisions or question of general

importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.
JAMES M. MCINERNEY,
Acting Head, Criminal Division.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

JULY 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945